STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
V	No. 295561 Huron Circuit Court
MICHAEL JEFFERY FABER, Defendant-Appellant.	LC No. 09-004732-FH

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a motor vehicle while visibly impaired, MCL 257.625(3), which as a third offense was elevated to a felony under MCL 257.625(11)(c), and of operating a vehicle while license was suspended, MCL 257.904(1). The judgment of sentence indicates that this was a second offense, MCL 257.904(3)(b), but the judgment is inconsistent with the trial court's remarks at the close of trial and at sentencing. The trial court sentenced defendant to two years' probation, with 60 days in jail, for the license offense. Defendant argues that the judgment of sentence should be corrected to delete the reference to second offense. We disagree, and affirm.

At the close of proofs, the prosecutor tendered a certified Secretary of State driving record indicating that defendant had a previous conviction for driving with a suspended license. MCL 257.904(9)(b) provides that the driving record was sufficient to establish the prior offense. The trial court erroneously concluded that it was not sufficient and accordingly, found that the second offense was not established.

The prosecutor contends that since the trial court erred in requiring more proof, the designation as a second offense was proper. The prosecutor also asserts that the court's oral pronouncement was superseded by the written order in the judgment of sentence.

Defendant did not raise his issue below but filed a motion for remand in this Court, which was denied. Thus, this issue is preserved for our review. We conclude that the prosecutor was not required to file a cross-appeal to raise its issue since it is not requesting relief more favorable than that rendered in the actual judgment of sentence. See *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). The prosecutor does not contest that the judgment of sentence was inconsistent with the court's oral pronouncement. Rather, the prosecution is in essence arguing that the designation as a second offense should remain, given the proof of the

prior conviction. This presents a question of law, which we review de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

MCL 257.904 provides in pertinent part:

> (1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, . . . shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.
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> * * *
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> (3) Except as otherwise provided in this section, a person who violates subsection (1) . . . is guilty of a misdemeanor punishable as follows:
>
> (a) For a first violation, by imprisonment for not more than 93 days or a fine of not more than $500.00, or both. . . .
>
> (b) For a violation that occurs after a prior conviction, by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

The trial court incorrectly failed to enhance the charge of operating while license suspended with a second or subsequent offense notice. Again, the statute only requires the prosecutor to demonstrate that defendant was operating a motor vehicle while his driving privileges were suspended. Proof of that fact may be established by providing the court with a copy of defendant's driving record. MCL 257.904(9)(b). The sentence imposed was within the enhancement parameters set forth in MCL 257.904(3)(b). The judgment of sentence suggests that the second offense was a substantive offense. Regardless of the suggestion in the judgment of sentence, the nomenclature utilized is irrelevant. The prosecutor suggests that the decision to enhance rests with the prosecutor, and that the trial court's function is in essence ministerial. We disagree with the prosecutor's statement. The fact that the court erred in not accepting the driving record does not reduce the court's role to a ministerial one. Because the trial court's sentencing was within the proper parameters, we need not remand for resentencing. This is a matter of form rather than substance. We see no practical reason for amending the judgment of sentence that accurately represents a conviction for operation of a motor vehicle with a prior suspended license.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio